FILED
MAR 18 2002
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No. 01-724

In The

Supreme Court of the United States

THOMAS J. CAPANO,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Delaware

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

1. CONSTITUTIONALITY OF DELAWARE DEATH PENALTY STATUTE

On January 11, 2002, the Court granted the Petition for Certiorari in *Ring v. Arizona*, ___ U.S. ___, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002). In its Brief, the State of Delaware ("State") conceded that Delaware's statutory scheme for imposition of the death penalty is "similar in nature" to the Arizona scheme which is at issue in *Ring*. (Brief in Opposition at 8). Nonetheless, the State suggests, instead of consolidating this case with *Ring*, that this Court "should hold the petition in this case pending the decision in *Ring*. . . . " (*Id.*). In response, Petitioner suggests that his Petition be granted and that the matter be consolidated, for briefing and argument, with *Ring*.

II. ENTITLEMENT TO LESSER INCLUDED OFFENSE INSTRUCTIONS UNDER THE DUE PROCESS CLAUSE

In its Brief, the State argues that the Petition for Writ of Certiorari ("Petition") should be denied because Petitioner's argument is "little more than a request that this Court undertake its own review of the exhaustive trial record, a request that is singularly inappropriate for the Court's exercise of its certiorari jurisdiction." (Brief in Opposition at 11). The State's claim that granting the Petition will inevitably immerse the Court in a *de novo* review of the evidence is simply incorrect. In fact, the points made by the State in its Brief actually serve to emphasize the real issue presented in the Petition; namely, that the Court should grant the Petition to decide just what kind of evidence will be deemed sufficient under *Beck v. Alabama*, 447 U.S. 625 (1980) to entitle a

defendant who is charged with capital murder to have the jury instructed on lesser included offenses.

The State argues that Petitioner has no complaint (other than seeking a review of the evidence itself) that the Delaware Supreme Court applied an "incorrect legal standard" in deciding whether the jury should be instructed as to lesser included offenses. The State claims that the legal standard in Delaware[1] is "identical to that employed by the federal courts." (Brief in Opposition at 9-10). That statement is not necessarily correct because the Court has not been entirely consistent in its formulation of the legal standard for entitlement to lesser offenses. *See, Sansone v. United States,* 380 U.S. 343, 350 (1965) ("A lesser included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense"); *compare, Keeble v. United States,* 412 U.S. 205, 208 (1973) ("A defendant is entitled to a lesser included offense instruction only if the evidence would permit a jury rationally to find the defendant guilty of the lesser included offense and acquit him or her of the greater offense"). In *Beck,* the Court noted that while the "States vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction, **they agree that it must be given when supported by the evidence**") (emphasis added). *Id.,* 447 U.S. at 636 & n. 12.

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[1] See, 11 *Del.C.* § 206(c) (Repl. 2001) (Lesser included offense instruction not required unless "there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense").

State court formulations of what evidence will "count" for purposes of entitlement to lesser included offense instructions are widely divergent. In *People v. Novak*, 643 N.E.2d 762, 770 (Ill. 1994), the court adopted *Sansone's* "disputed factual element" test and stated that even "where the testimony is not conflicting, this requirement may be satisfied if the conclusion as to the lesser offense may fairly be inferred from the evidence presented." *Id.* The court also stated that the quantum of evidence required may be "any," "some," "slight," or "very slight." *Id.* In *State v. Sivri*, 646 A.2d 169, 181 (Conn. 1994), the court also employed *Sansone's* "disputed factual element" test. In reversing the defendant's conviction for intentional murder, the court noted that "the critical element distinguishing murder from its lesser included offenses is intent . . . the most elusive element of the crime charged." *Id.* at 182. The court held that "if the evidence suggests at least a possibility that the defendant acted with a lesser intent than that of the specific intent to kill . . . then the defendant was entitled to lesser included offense instructions." *Id.* In *State v. Santillan*, 948 S.W.2d 574, 576 (Mo. 1997) (*en banc*), the court stated:

> The [Missouri statute][2] requires only that there be a basis for the jury to acquit on the higher offense in order for the court to submit an instruction for the lesser included offense. If a reasonable juror could draw inferences from the evidence presented that the defendant did not deliberate, the trial court should instruct down. **The defendant is not required to put on affirmative evidence as to lack of deliberation to**

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[2] V.A.M.S. § 556.046.2.

> **obtain submission of a second degree murder instruction** (emphasis added).

In *Willett v. State*, 836 P.2d 955, 958 (Alaska App. 1992), the court described the "some evidence" test as follows:

> In order to satisfy the "some evidence" test, it is not necessary that the defendant testify or even offer direct evidence in his own behalf. Some evidence establishing a dispute as to a factual issue may arise from weakness in the prosecution's evidence or from impeachment of its witnesses. Similarly, circumstantial evidence presented as part of the state's case-in-chief may give rise to some evidence of a disputed fact.

At the opposite end of the spectrum is *Skinner v. State*, 956 S.W. 2d 532, 543 (Tex.Cr.App. 1997), where the court held:

> Some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. Rather, there must be some evidence directly germane to a lesser included offense for the factfinder to consider before an instruction on a lesser included offense is warranted.

Finally, it should be noted that the rationale of the Delaware Supreme Court for rejecting Petitioner's argument that "reasonable doubt" evidence entitled him to lesser included offense instructions closely parallels the holding of the Texas court in *Skinner* and is in contradiction to the other decisions cited above. *See*, Pet. App. A118-A121. As the above cited decisions illustrate, the entitlement to lesser included offense instructions under the Due Process Clause, recognized in *Beck*, varies according to geography. In the absence of a standard which

clearly defines and makes uniform the "some evidence" test recognized in *Beck*, then *Beck* itself is reduced to the proposition that a capital defendant is entitled to instructions only on those lesser included offenses to which state law says he is entitled. If that were the case, then *Beck* itself is rendered meaningless.

CONCLUSION

For the reasons set forth herein and in the Petition for Certiorari, the Court should grant the Writ as to both questions presented and consolidate the first question with the pending appeal in *Ring v. Arizona*.

Respectfully, submitted,

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